

Initial Commentary Regarding The Implementation Of The DMCA

By Dan Kaminsky
Effugas@best.com

This essay will be modified over time; however, I feel I must put forth my position now; indeed, I feel that this comment period is make-or-break for consumer rights in the United States of America. This may very well be the last time that democratically determined regulations, as opposed to backdoored contract law, will determine what I may and may not do with my own property.

Above all else, it is critical that the Library of Congress soundly reject the supposed right of content producers to attach arbitrary, unnegotiated, and unconscionable legal demands upon the public who funds their productions. Products are purchased under an implied contract that careful design and long term stability from provider to provider have formed in the minds of both parties. This contract, whose uniformity and fairness is a critical component of the content marketplace, specifies sets of rules regarding what may or may not be allowed. The cost of specifying arbitrary restrictions upon usage is near-zero for the content provider, but approaches impossibility to bypass for the average consumer, or even the large scale educational institution. *All freedoms that the Library Of Congress would establish are contingent upon customers not being compelled to waive them.* As this essay will address, this is the game plan of many media industries.

Among the most interesting uses of contract law to spoof established precedent is the DVD CCA's combination of onerous and arguably collusive contracts against consumer hardware manufacturers, combined with click-through licenses against software designed to view digital video media. I state interesting because although there is a constitutional mandate in the 9th amendment to place the burden of proof for any government-backed restriction against the government, by completely cornering the suppliers of consumers and then attaching contract code to redirect consumer self-help, they make impossible any forms of behavior not specifically allowed. The content provider uses the government-supplied IP protections to implement relief explicitly denied in the courtroom—Sony v. Universal, 1984 is irrelevant if consumers are banned the capability to record that which they have not specifically been allowed.

If one examines the text of that decision, you'll see that the court wouldn't even grant content providers the right to state whether a given show could be recorded, could not be, or could be held on tape for a maximum of seven days. The burden was not on the customer to act in a manner specifically prescribed by the content provider; rather the burden was on the content provider to show the societal benefit to such limitations.

Exclusionary legal tactics allow this battleground to be flipped, and pervert and mock the democratic institutions they are asking to back their regulatory plans. The extremity of the situation should not be underestimated—a sixteen year old boy and his

father recently suffered six hours of police interrogation and an impounding of all computer equipment for the child's suspected crime of accessing more of his own disc than the manufacturer desired.

Therein lies the problem, the burden, and the rub. I either own something or I don't. Ownership has never implied absolute right—directly copying a hammer design and selling a new hammer based on it has always been seen as a form of theft. But the terms under which sales may be both made and suppressed have always been limited—just as homes can never possess racial biases in their purchase clauses, products may not arbitrarily change their purchase properties depending upon the buyer. It would be unfair for a contractor to be required by the fine print to do anything other than pay for the hammer he purchased; if the content industry had its say, they'd be able to tell him he wasn't allowed to build another damn Victorian!

The main problem with such burden shifting is it goes a long way to violate the time honored sanctity of the home. The general concept is that individuals have the right to watch, listen to, and play freely in their own abode, and it was the privacy of such that emanates so powerfully from so many amendments. The third amendment is of particular interest—many of the demands of the content industry feel as if they expect me to pay for an electronic police officer to restrict my own usage of my own media, “quartered” if you will at my own expense.

This is tragic, of course, because the future of content management technology within the next three years—heck, within the next eight months—is astonishing. The Media Jukebox is a coming force in home content management. People speak much about movies and songs, but it's truly television shows and music videos that will be the most relevant of the video signals recorded—combined with L&H's 300,000 word voice recognition hardware, voice cognition as a way to comb through large archives of music is inevitable. Beyond being inevitable at the home level, both college institutions and American institutions such as the library of congress will within the next year amass gigantic archives of audiovisual content, all quickly searchable and seekable through speech recognition systems.

As much as the DVD CCA seeks to discredit Linux, the first such content management system is likely to arrive on this platform—not one but two major speech recognition systems are available for the platform, known far and wide for its ease to connect dissimilar constructs. Stating an author of a title and the desired content and getting instant service is a likely within the next three years, and likely much less.

But more important than cool jukeboxing is the basic, necessary, and critical right to transfer data. Portable systems for are on an exceedingly fast miniaturization clip, but a DVD will always be 5.25 inch diameter. Airliners will likely provide power outlets for fliers to watch movies stored on a 2.5” 20GB laptop hard drive and viewed on a full-coverage LCD, FED, or OLED glasses array. Attempts to state that users could just bring the original disks shift the burden unacceptably—that the user wishes to use their property in a unique matter is sufficient reason to allow. The widespread discontent with

the SDMI system's preannouncements—devices which possess no interoperability, no transportability, and a high risk to the user of losing their paid for data—becomes much more disturbing when you realize that the plan is to shift *the entire market* to one where the ability to execute what was once a basic right—making a backup for emergencies—is now a “value added feature”. *It is wrong to allow IP law to be twisted like this.*

Three more issues must be brought up before I complete this essay: One, the right of first sale. Literally hundreds of millions, if not billions of dollars in consumer money could be lost to an architecture that bans the transfer of audio to third parties. Circumvention of copy protection for the purpose of allowing a fair use sale of one's properly purchased content *must* be protected as a core right of commerce. Second, the needs of the disabled in having technology that directly interfaces with the core protocols must be addressed—and it should be noted that the sensory enhancing aspects for those without may yield exciting and fascinating new techniques for those with—look at the myriad of uses Closed Captioning has been put to!

Finally, I leave you with the concept of Privacy. People wonder why those of us in the Open Source community are so paranoid about privacy. At the DVD trial, people kept asking, “Where is Xing? Their key was compromised, why isn't Xing here to fight the reverse engineering?” I offer the following answer: Xing is owned by Realnetworks. RealNetworks is presently being sued for secretly spying on more than one hundred million Americans by means of a covert monitor embedded in their software.

The key was discovered by reverse engineering. Thus, Xing's notable absence.

I hope that this essay, while admittedly hastily prepared, is of some use to your organization. Please feel free to contact me if there's any further clarifications I can make.

Yours Truly,

Dan Kaminsky
DoxPara Research
<http://www.doxpara.com>